IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised: No

Date: 28/06/2022

A Maier-Frawley

CASE NO: 2019/38568

ABSA BANK LIMITED Applicant

and

CASPER APPELCRYN Respondent

JUDGMENT

MAIER-FRAWLEY J:

Introduction

1. This is an application for the provisional sequestration of the respondent in terms of sections 9 and 10, read with section 8(b) of the Insolvency Act, 24 of 1936 ('the Act').

2. The respondent opposes the application on the strength of defences raised *in limine* pertaining to issues of (i) *res judicata* and (ii) non-compliance with section 9(3) of the Act. As regards the merits, he alleges that he is factually

solvent in that his assets (comprising of immovable properties) exceed the value of his indebtedness to his creditors (including the applicant).

3. The application is premised on the respondent's indebtedness to the applicant in terms of a a judgment debt; that the respondent committed an act of insolvency as envisaged in section 8 (b) read of the Act; and that there is reason to believe that it will be to the advantage of creditors for the respondent's estate to be sequestrated.

4. The respondent applied for condonation for the late filing of his answering affidavit. Opposition to such application was not pursued at the hearing of the matter. The explanation given for the delay was satisfactory. As the period of delay was relatively short and as it resulted in no discernible prejudice to the applicant, I considered it to be in the interests of justice that condonation be granted.

Background

5. The following are the common cause or undisputed or unrefuted facts on the papers.

6. During 2016 the applicant brought a sequestration application against the respondent premised on the respondent's factual insolvency ('the first sequestration application'), which was dismissed in the judgment of Van Der Linde J on 31 October 2017.

7. The applicant then issued summons against the respondent for payment of amounts owed to it in respect of monies lent and advanced to the respondent. On 28 March 2019 the applicant obtained summary judgment against the respondent for payment of the amounts of R3,582 377.16 and R7, 029 600.73 respectively, together with interest and costs. In addition, six immovable properties comprising agricultural land, being commercial farms

owned by the respondent, were declared specially executable ('the judgment'). By 1 October 2019, the amounts due to the applicant in terms of the judgment had increased to R10, 672 467.34 and R5, 287 008.10 respectively. Since then, interest on the judgment debt, which is capitalised and compounded monthly, has continued and continues to accrue daily.

8. On 24 July 2019 the Sherriff of the Court sought to execute upon the judgment consequent upon a warrant of execution that was issued by the Registrar of Court. The writ of execution was personally served on the respondent at his residence, described as Farm 157 Groenplaats Randfontein. The Sherriff rendered a *nulla bona* return, recording therein *inter alia,* that no movable assets or moneys were pointed out by the respondent or found by the Sherriff, sufficient to satisfy the judgment debt and costs.

9. On 1 November 2019, armed with a judgment and a *nulla bona* return, the applicant issued the present application for the respondent's sequestration.

10. It is convenient to deal first with certain preliminary points raised by the respondent before evaluating the merits of the application.

Discussion

Res Judicata

11. The respondent argues that the applicant brought substantially the same application based on the same cause of action, which was dismissed by Van Der Linde J in the first sequestration application.

12. As is evident from the judgment of Van Der Linde J, the first sequestration was brought on the basis that the respondent was factually insolvent in that his liabilities exceeded his assets, whereas the present application is brought on the basis that the respondent committed an act of insolvency a envisaged

in section 8(b) of the Act. In dismissing the first sequestration application, the court found that the respondent's factual insolvency had not been established on the papers, given that the value of two of the properties owned by the respondent alone exceeded the value of his then liabilities.

13. In *Ascendis*[1] the Constitutional Court emphasised that, in strict terms, *res judicata* means that a matter has already been decided by a competent court on the same cause of action and for the same relief between the same parties.[2] The Constitutional Court quoted with approval the judgment by Corbett JA in *Evins*[3] in which the following was said:

> *"Closely allied to the once and for all rule is the principle of res judicata which establishes that, where a final judgment has been given in a matter by a competent court, then subsequent litigation between the same parties, or their privies, in regard to the same subject-matter and based upon the same cause of action is not permissible ...".* (emphasis added)

14. In *McKenzie*[4] Maasdorp J approved the following English definition of *'cause of action'*:

> *"... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved".*

15. Section 9(1) of the Act envisages two distinct and separate causes of action. One is based on a legislatively defined act of insolvency and the other on actual insolvency. This application is based on the former whilst the first

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1 *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others* 2020 (1) SA 327 (CC), para 69.

2 The fact that the Constitutional Court was divided on the outcome of the matter in *Ascendis* has no bearing on the principles of *res judicata*.

3 *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835E-G.

4 *McKenzie v Farmers' Co-operative Meat Industries* 1922 AD 16.

sequestration application was based on the latter. Section 9(1) provides as follows:

"A creditor or its agent who has a liquid claim for not less than £50.00, or two or more creditors or their agent who in the aggregate have liquidated claims for not less than £100.00 against a debtor who has committed an act of insolvency, ***or*** *is insolvent, may petition the court for the sequestration of the estate of the debtor."* (emphasis added).[5]

16. Although the applicant sought the same relief in the first sequestration application as that which is sought in the present application, i.e., a sequestration order, the facts requiring proof by the applicant to establish actual insolvency on the part of the debtor in the first sequestration application differed from the facts that are necessary to prove the act of insolvency relied on in *casu*. In the first sequestration application, it was incumbent upon the applicant to prove that the respondent's liabilities exceeded his assets for purposes of establishing the debtor's actual insolvency. In this application, the applicant is required to prove the act of insolvency it relies on, which is factually founded on the Sherriff's *nulla bona* return. In that event, it is incumbent upon the respondent to rebut the consequences of that act by demonstrating his solvency.[6]

17. In all the circumstances, I am not persuaded that the respondent has established the requirements of *res judicata* and accordingly the point must fail.

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[5] In terms of section 8(b) of the Act, an act of insolvency is defined as:

> *"A debtor commits an act of insolvency – if a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer* ***disposable property*** *sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment;"* (emphasis added).

[6] See *Van Vuuren v Jansen* 1977 (3) SA 1062 (T).

Non-compliance with section 9(3) of the Act.

18. The respondent further contends that the applicant has failed to comply with section 9(3) of the Act as particulars of the name and identity number of his wife were not included in the heading to the application or confirmed in the affidavits filed in support of the application. [7]

19. Section 9(3)(a) requires an application for sequestration to contain certain facts, which facts include, amongst others, the marital status of the debtor and, if he is married, the full names and date of birth of his spouse and, if an identity number has been assigned to his spouse, the identity number of such spouse. Section 9(3)(b) requires those facts to be verified on affidavit. In terms of s 9(3)(c), details, *inter alia*, pertaining to the debtor's spouse must

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[7] Section 9(3) reads as follows:

"(a) Such a petition shall, subject to the provisions of paragraph (c), contain the following information, namely-

(i) the full names and date of birth of the debtor and, if an identity number has been assigned to him, his identity number;
(ii) the marital status of the debtor and, if he is married, the full names and date of birth of his spouse and, if an identity number has been assigned to his spouse, the identity number of such spouse;
(iii) the amount, cause and nature of the claim in question;
(iv) whether the claim is or is not secured and, if it is, the nature and value of the security; and
(v) the debtor's act of insolvency upon which the petition is based or otherwise allege that the debtor is in fact insolvent.

(b) The facts stated in the petition shall be confirmed by affidavit and the petition shall be accompanied by a certificate of the Master given not more than ten days before the date of such petition that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all sequestration proceedings and of all costs of administering the estate until a trustee has been appointed, or if no trustee is appointed, of all fees and charges necessary for the discharge of the estate from sequestration.

(c) The particulars contemplated in paragraph (a) (i) and (ii) shall also be set out in the heading to the petition, and if the creditor is unable to set out all such particulars he shall state the reason why he is unable to do so.

also be set out in the notice of motion, and if the creditor is unable to set out all such particulars he 'shall state the reason why he is unable to do so'.

20. The marital status of the respondent was disclosed in the founding affidavit. The requisite details of his spouse, which were not contested, were disclosed in the replying affidavit, verified under oath. After the filing of the replying affidavit, it is common cause that the applicant sought and obtained leave of court to include the requisite details of the respondent's spouse in the heading to the notice of motion, which amendment was thereafter duly effected.[8] Section 9(3)(b) requires that the information be confirmed by affidavit, which has in fact occurred. Pursuant to the amendment aforesaid, these details also appear in the notice of motion. Accordingly, the applicant submits that there has been material and substantial compliance with the provisions of section 9(3) of the Act, a contention which was not seriously opposed by the respondent at the hearing of the matter.

21. Instead, the respondent pursued the argument that the applicant failed to provide proof of service of its amended notice of motion on SARS, the Master of the High court and the respondent's spouse. In addition,, the court order granting leave to amend was itself not served on such parties. The papers indicate that the application for leave to amend was served on the Master and SARS.[9] The nature and substance of the proposed amendment was thus brought to their notice. Neither SARS nor the Master opposed the application for leave to amend or indicated that they had any intention of participating therein. The same situation prevails as far as the present application is concerned. Section 9(4)(A) of the Act does not require service of the application upon the spouse of a debtor, hence I see no reason why the application for leave to amend was required to be served on the debtor's

[8] Although the applicant sought a final sequestration order in its pre-amended notice of motion, it was also granted leave to amend same in order to seek only a provisional sequestration order.
[9] See p 020-5 and 020-7

spouse. I am therefore not persuaded that the point raised *in limine* holds merit and accordingly it too must fail.

Requirements for provisional sequestration

22. For an order for provisional sequestration to be granted, three questions must be answered in the affirmative:[10] (i) Does the applicant have a liquidated claim? (ii) Has the respondent committed an act of insolvency? and (iii) Is there reason to believe that sequestration of the first respondent's estate will be to the advantage of creditors?

23. As to the first requirement (liquidated claim), the respondent's liability for payment of the judgment debt is not in dispute. It is clearly a liquidated claim. Certificates of balance provided in the founding affidavit further indicate the extent of the respondent's present indebtedness to the in an amount exceeding R15 million, which amount is also not in dispute. The whole of the indebtedness, which continues to increase each month as unpaid interest accrues, remains unpaid despite the lapse of a period of more than six years since the launch of the first sequestration application and a period of three years since the grant of judgment against the respondent. Despite those facts, the unrefuted evidence is that the respondent has failed to sell any of his immovable properties in discharge of his admitted indebtedness.[11] The properties owned by the respondent

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[10] 2 Section 10 of the Act provides for provisional sequestration as follows:
"**10. Provisional sequestration** – If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that prima facie—
(a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection 1 of section 9; and
(b) the debtor has committed an act of insolvency or is insolvent; and
(c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,
it may make an order sequestrating the estate of the debtor provisionally."

[11] In para 5.7 of the founding affidavit, the applicant states that the respondent flatly refused to sell any of the farms despite the applicant's attempts to reach agreement with the respondent for the sale of the farms by private treaty in order to enable him to settle his indebtedness to the applicant. In the answering affidavit, the respondent merely denies that any 'attempt was made to negotiate' with him since the granting of judgment against him on 28 March 2019, but provided no plausible counter-narrative pertaining to the applicant's allegations.

consist of commercial farms, all or most of which are bonded to the applicant as first mortgagee.

24. As to the second requirement (act of insolvency), the Sherriff rendered a *nulla bona* return in which he recorded the following:

> *" In satisfaction of the writ I demanded from the above named the following amounts - Judgment debt of R7 029 600.73 plus further costs. The above named informed me that he has no monies or attachable movable assets inter alia, wherewith to satisfy the judgment debt with costs or part thereof, no assets were either pointed out or could be found by me after search and enquiries at this address."*
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> Therefore this is a return of nulla bona."[12]

25. Section 8 of the Act provides that:

> *'8. A debtor commits an act of insolvency –*
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> *(b) if a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment;...'*

26. As pointed out in *Collier,* [13] the provision refers to two acts of insolvency. The first is committed when the debtor fails to satisfy the judgment or to indicate sufficient disposable property to satisfy it; and the second when the sheriff fails to find sufficient property to satisfy the judgment.

27. The respondent admits having informed the Sherriff that he did not have sufficient movable assets with which to satisfy the judgment debt.[14] He does not suggest in his answering affidavit that he pointed out any disposable assets, whether movable or immovable, sufficient to satisfy the judgment debt. Nor does he aver that that he informed the Sherriff that the judgment could be satisfied from the proceeds of any immovable properties owned by

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[12] The return of service appears at 0001-210 of the papers.
[13] *Absa Bank v Collier* 2015 (4) SA 364 (WCC) ("*Collier*")
[14] Para 5.4 of the answering affidavit at 0005-8.

him. He merely states that the return is incorrect vis-à-vis the statement that *'no assets were ... found by me after search and enquiries at the address'* because the attachment to the return indicates that an inventory was made by the Sherriff of movable assets, although these were not specified in the papers. Ultimately, however, the return shows *prima facie* that the respondent failed upon the demand of the Sherriff to satisfy the judgment debt or to inform the Sherriff of assets sufficient to satisfy it or to point out sufficient assets with which to satisfy the debt.

28. The respondent avers in the answering affidavit that immovable properties owned by him are worth in excess of R30 million 'and therefore there is sufficient disposable property to satisfy the judgment debt', albeit not in liquid cash form. [15] Put differently, the respondent relies on the existence and his *ipse dixit* of the value of his immovable properties in order to refute the act of insolvency relied on by the applicant. It is therefore necessary to consider the legal position where immovable property belonging to the debtor can be relied on in order to countervail a *nulla bona* return.

29. In *Collier*,[16] the court had occasion to consider whether immovable property that was co-owned the respondent debtor, over which the appellant creditor (Absa bank) held a first mortgaged bond, constituted 'disposable' property' within the meaning of s 8(b) of the Act. The court found that under normal circumstances where a creditor who is a first mortgagee of immovable property attempts to execute against assets of the debtor, such property could be taken into account when considering the question of whether there exists disposable property sufficient to extinguish the a judgment debt. In that case, the respondent argued that he had informed the Sherriff of the existence of his immovable property, the value of which was sufficient to

[15] See para 5.4 of the answering affidavit at 0005-8.
[16] *Absa Bank v Collier* 2015 (4) SA 364 (WCC) ("*Collier*")

satisfy the judgment obtained against him. Having embarked on an extensive analysis of the conflicting authorities on the point, the court ultimately concluded that the property in question was disposable.[17]

30. In *De Waard,*[18] Bristowe J, in a concurring judgment, expressed the view that:

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[17] Id, *Collier,* paras 33 & 34, where the following was said: "*...What permits a conclusion that immovable property in respect of which a preferent creditor may obtain a writ and execute is 'disposable' is that there exists no restriction on such execution, save for that the requirements of rule 46(1) having been met, and no consent of other mortgagees or judgment creditors required in order to proceed against the property.*
In the circumstances of the current matter, the immovable property held by the judgment debtor is therefore disposable at the instance of the judgment creditor, being the first mortgagee, for purposes of s 8(b) regardless of the fact that the property had not been declared specially executable. It follows that the decision in Van der Poel is correct and that it is binding upon this Court."

The case of *Van der Poel* v Langerman 3 Menz 307 was cited in para 13 of the judgment as follows:

"In *Van der Poel v Langerman* immovable property in respect of which the judgment creditor held a first mortgage bond was found to constitute '*sufficient disposable property*' within the meaning of s 4 of Ordinance 64 of 1843 and that:

'*...the word "property" included real as well as movable property – (vide Burton's Insolvent Law, p. 44); that as the affidavit stated, and the plaintiff did not deny the allegation, that the property was worth upwards of £2,000, the defendant had shown he was possessed of sufficient property to satisfy the plaintiff's judgment; and that as the plaintiff held the first mortgage, not only was this property disposable for the satisfaction of that judgment, but that it could be disposed of by the plaintiff for that purpose, by attachment and judicial sale, as easily, and in as short a time, as under a sequestration of the defendant's estate.*

That in this case it was unnecessary for the defendant to have pointed out the hypothecated real property to the Sheriff's officer, seeing that the plaintiff's own bond informed him of it; and that he ought, after the return made on the writ against the defendant's goods and chattels, to have sued out a writ for attaching the immovable property...' "(footnotes omitted)

[18] *De Waard v Andrew & Thienhaus Ltd* 1907 TS 727, a case in which immovable property was bonded to a third party, Innes CJ concluded at 732 of the judgment that '*We must assume that the pointing out of land would be a sufficient pointing out of disposable property within the meaning of the section. But the land must be freely disposable. And land mortgaged to a third person would not fall within that category, because the consent of the mortgagee would have to be obtained.*' (emphasis added).
Earlier at p 727 of the judgment, the learned judge stated that *"According to our insolvency law the applicants were perfectly entitled to ask for such an order, because if a man makes a return of nulla bona that is prima facie proof that he is insolvent.* ***It is then for him, upon the return day, to prove without a shadow of doubt that he is solvent.*** *The court undoubtedly has a discretion to say that although a man has made a return of nulla bona, still, under the circumstances of the case, it does not think it to the advantage of creditors that sequestration should be decreed, because the estate is able to pay 20c in the pound" (emphasis added).*
More importantly, Innes CJ also stated that ""*Where a man cannot pay his creditors, where a writ has been taken out against him, and where he says "I have not got the means, and I cannot find the*

"Mortgaged property is not property which is immediately disposable. It can only be sold after certain processes have taken place, or at all events after certain consents have been obtained. Whether it would be disposable property if, when the insolvent pointed it out, he also handed a consent or a power of attorney from the mortgagee to sell, is another question; but, at all events, where that has not taken place I do not think mortgaged property is "disposable property" within the meaning of section. That being so, an act of insolvency has been committed."[19] (emphasis added)

31. On the unrefuted evidence in *casu,* the respondent was handed a power of attorney by the applicant's attorneys to permit the marketing and sale of his properties by way of private treaty or by holding special controlled private auctions in order to obtain the highest possible prices possible for the properties, which he refused to sign. The respondent also indicated that he has no intention of selling his properties and refused to permit the applicant access to the properties when valuations were required.[20] He baldly denies that he has refused to sell his properties, yet he offers no explanation as to why he has made no attempt whatsoever to market and sell these assets in order to obtain the best possible price for purposes of discharging his liabilities.

32. The applicant submits that *Collier* is distinguishable on its facts. I agree. In *Collier,* the debtor had informed the Sherriff of his immovable property and that its value would extinguish the indebtedness owed to the creditor. There was no suggestion in that case that the property, if sold, would *not* extinguish the indebtedness owed. In the present case, the respondent failed to inform the Sherriff of the existence and value of his immovable properties or to point out disposable property of sufficient value that could be used to

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*money" – **I hold very strong views that that man, notwithstanding any special pleading to the contrary, is prima facie insolvent**."* (emphasis added).

[19] Id, de Waard, at 738

[20] See paras 11 to 14 of the replying affidavit at 0007-7 and 0007-8. Since the respondent did not avail himself of the right to present further evidence to challenge factual allegations in the replying affidavit, I see no reason why the evidence tendered in reply, which remains unrefuted, should be ignored.

expunge the debt owed by him. Furthermore, the applicant states that the properties in question, which comprise agricultural commercial farms, are not easily realised on the open market. The reason is self-evident. The niche area within which one markets such commercial agricultural property substantially limits the buying power or ability to achieve market value for the properties as compared to ordinary easily marketable residential property, as was considered in *Collier.*

33. The applicant avers that the properties which were declared specially executable in favour of the applicant would likely not realise sufficient value to extinguish the respondent's indebtedness. This is because no reserve prices were set by court in declaring the properties executable and there therefore remains a real likelihood that the applicant will be forced to acquiesce to offers achieved at the highest bid at the fall of a hammer at any forced sale, which will be to the prejudice of the general body of creditors. The papers indicate that the respondent has at least two other creditors, namely Land Bank and SARS. The full extent of his indebtedness to such creditors is unknown, as the respondent has failed to provide supporting documentary proof of his financial business affairs,[21] or his assets and liabilities.

34. Save for the unsupported bald allegation that his immovable properties are worth in excess of R30 million, the respondent has failed to provide expert valuations in support of the current day value of the properties. Although the applicant attached unattested valuations obtained in 2019 of the respondent's properties to its papers, such valuations are presently outdated. But perhaps more significantly, the respondent has not adopted

[21] The respondent was invited in para 7.3 of the founding affidavit to provide supporting documentation of his financial staus including his assets and liabilities and his annual financial statements. He did not do so, contending that such documents were either not available or had not been received by him as yet.

those valuations or confirmed the reliability or admitted the contents thereof. In any event, since the valuations were not confirmed under oath, it is doubtful whether they carry any significant evidentiary weight.[22] It is thus impossible on the papers as they stand to determine an accurate anticipated market or forced sale value in the current economic climate or whether any such value will be sufficient to settle the respondent's debts.

35. In my view, the applicant has succeeded in *prima facie* establishing that the respondent committed an act of insolvency as envisaged in s 8(b) of the Act. The respondent has failed to rebut the *prima facie* inference arising from the *nulla bona* return that he has insufficient disposable property with which to satisfy the judgment debt. On his own version, he failed to point out or inform the Sherriff of other disposable immovable properties. It was incumbent on him to inform the sheriff of the whereabouts of such property and to describe it in order to demonstrate its sufficiency.[23]

36. As to the third requirement (advantage to creditors), the legal position was conveniently summarised in *Meier.*[24]

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[22] See: *Nedbank Ltd v Mzizi and Related Cases* 2021 (4) SA 297 (GJ), although decided within a different context, the views expressed by Fisher J in relation to the requirements for a valuation of the fair market related price of properties sold in execution, hold true for all such sales.

[23] See *Meier v Meier* (15781/2015) [2021] ZAGPPHC 456 (6 July 2021), paras 36 -37.

[24] Id *Meier,* at paras 40 - 42, where the following was said:

"In *Meskin & Co v Friedman* 1948 (2) SA 555 (W) at 558 – 559 Roper J stated:

'Sections 10 and 12 of the Insolvency Act 24 of 1936, cast upon a petitioning creditor the onus of showing, not merely that the debtor has committed an act of insolvency or is insolvent, but also that there is 'reason to believe' that sequestration will be to the advantage of creditors. Under s 10, *which sets out the powers of the Court to which the petition for sequestration is first presented, it is only necessary that the Court shall be of the opinion that prima facie there is such 'reason to believe'. Under* s 12, *which deals with the position when the rule nisi comes up for confirmation, the Court may make a final order of sequestration if it 'is satisfied' that there is such reason to believe. The phrase 'reason to believe', used as it is in both these sections, indicates that it is not necessary, either at the first or at the final hearing, for the creditor to induce in the mind of the Court a positive view that sequestration will be to the financial advantage of creditors. At the final hearing, though the Court must be 'satisfied', it is not to be satisfied that sequestration will be to the advantage of creditors, but only that there is reason to believe that it will be so.'*

37. It is not disputed on the papers that the respondent's only meaningful assets comprise the immovable properties. Aside from an unsubstantiated allegation that the respondent owes Land bank an amount of R430,440.45, the full extent of his liability to SARS remains unknown as no evidence has been put up by the respondent as to the extent of such liability. As earlier indicated, the amount owing to the applicant is in excess of R15 million, with interest thereon accruing daily.

38. The applicant avers that a forced sale of the respondent's immovable properties will not benefit the respondent's creditors whereas a sale by a trustee by private treaty or special public auction would likely result in a meaningful and not-negligible dividend to creditors. If the properties were to sold, assuming the correctness of the postulated value of the respondent's immovable properties, a dividend of between 40c and 50c in the rand would be available for the distribution of creditors. Any enquiry convened under the provisions of the Act may possibly also uncover further assets for the benefit of creditors. Although the respondent baldly denies these facts, he has failed to meaningfully engage therewith or to refute same in the answering affidavit. In the circumstances, I am satisfied that there is reason to believe that it will be to the advantage of creditors if his estate is provisionally sequestrated.

Further Roper J stated:

'*...the facts put before the court must satisfy it that there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary will result to creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of enquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient.*"

This was echoed in *Nedbank Ltd v Groenewald* 2013 JDR 0748 (GNP) and afterwards, this approach was also followed by the Constitutional Court in *Stratford and Others v Investec Bank Ltd and Others* 2015 (3) SA 1 (CC).

39. In *FirstRand Bank Limited v Evans,* [25] the court held that:

> *"...[If] the conditions prescribed for the grant of a provisional order of sequestration are satisfied then, in the absence of some special circumstances, the Court should ordinarily grant the order. It is for the Respondent to establish the special circumstances that warrants the exercise of the Court's discretion in his or her favour."*

40. I am not persuaded that the respondent has established the existence of special circumstances in this matter, such as would persuade me to exercise my discretion against the grant of a provisional order. The argument proffered on behalf of the respondent is that the applicant could have executed against the properties in 2019 when the respondent's indebtedness to the applicant was substantially less, in circumstances where the respondent was factually solvent and that it ought only to have sought a sequestration order in the event of a shortfall after execution. The applicant still has an alternate remedy available to it by way of execution against the properties. This argument however loses sight of the fact that the respondent has done nothing in the intervening period to repay his indebtedness to the applicant, either by marketing and selling his properties himself or by co-operating with the applicant in providing a power of attorney for it to sell the properties by way of private treaty/private auction in an attempt to procure the best possible price. He continues to enjoy the benefits of a commercial farming enterprise at the expense of the applicant without having to account for the profits or losses sustained by him in so doing. In any event, the applicant explained that despite the fact that it obtained an order declaring certain of the respondent's commercial farms specially executable, it remained cognisant of the difficulties inherent in selling agricultural land and, after considering its options, took the view that the most advantageous remedy was the respondent's sequestration for the benefit of his general body of creditors.

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[25] *FirstRand Bank Limited v Evans* 2011 (4) SA 597 KZD at para 27

41. It is not in dispute that the applicant has complied with the necessary formalities established by the Act. The applicant has established the jurisdictional requirements for the respondent's provisional sequestration. It remains open to the respondent to provide admissible evidence of the value of his properties in order to demonstrate that he is possessed of disposable property sufficient to satisfy the judgment debt on the return date.

42. Accordingly, the following order is granted:

ORDER:

1 The estate of the respondent is placed under provisional sequestration.

2 The respondent is called upon to advance reasons, if any, why the court should not order the final sequestration of his estate on 7 July 2022 or so soon thereafter as the matter may be heard.

3 The costs of the application shall be costs in the sequestration.

AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 9 May 2022
Judgment delivered 28 June 2022

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 28 June 2022.

APPEARANCES:

Counsel for Applicant:	Adv ARG Mundell SC together with Adv N Alli
Attorneys for Applicant:	Jay Mothobi Incorporated Attorneys
Counsel for Respondent:	Adv M Boonzaier
Attorneys for Respondent:	WMA Attorneys c/o Roxanne Barnard Attorneys